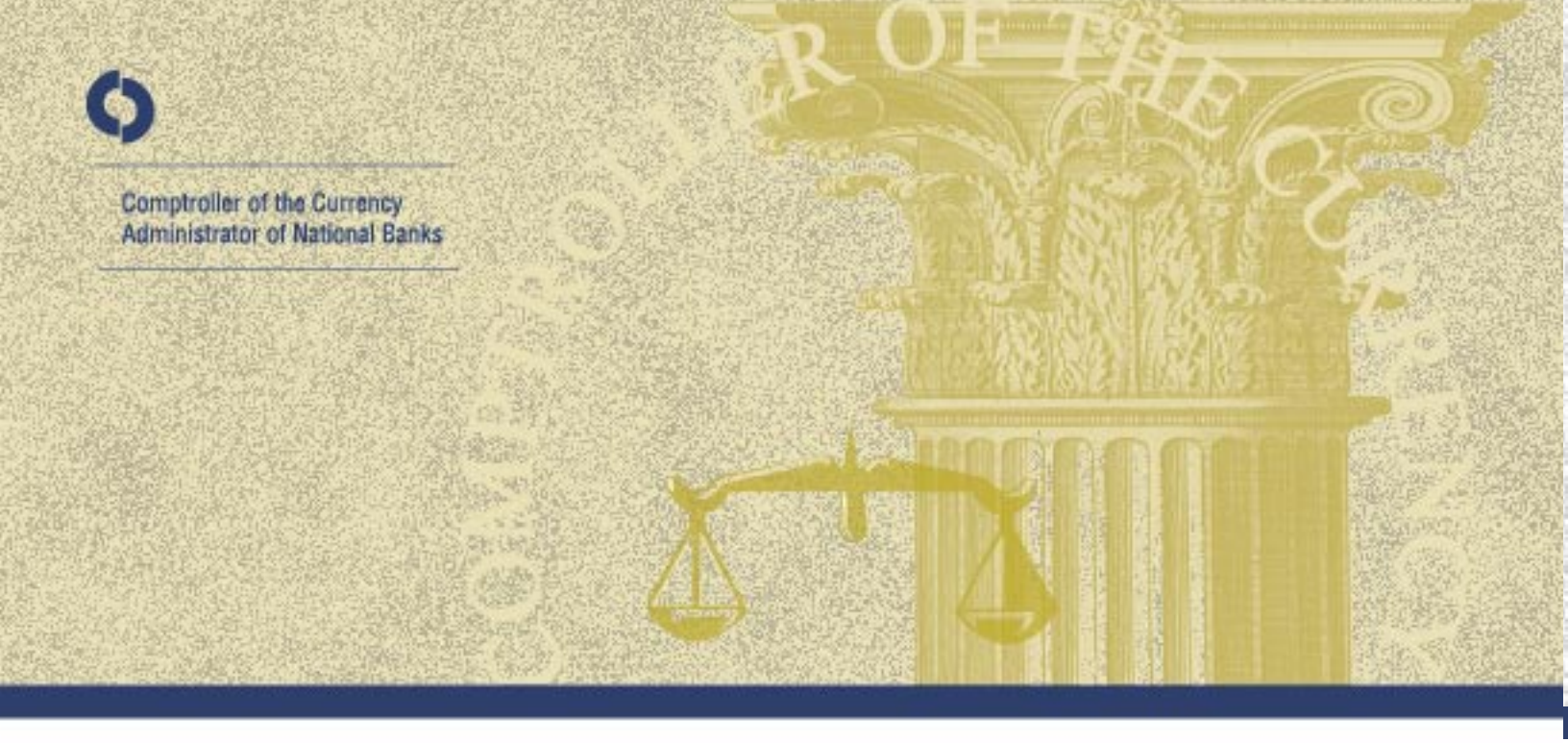

Comptroller of the Currency
Administrator of National Banks

# Significant Legal, Licensing, and Community Development Precedents for National Banks

2004

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**Office of the Comptroller of the Currency**

**March 2005**

# Contents

# Significant Legal, Licensing, and Community Development Precedents for National Banks

## Activities

### General Banking Activities

#### *Corporate Governance and Structure*

- *Change in Asset Composition.* A national bank must seek prior approval from the OCC for a fundamental change in its asset composition pursuant to 12 CFR 5.53. A national bank received approval to sell all of its deposit liabilities and substantially all of its assets to an unrelated financial institution. The Federal Deposit Insurance status of the national bank was to be immediately terminated after the deposit sale, and the bank would cease its existence by merging into its nonbank affiliate pursuant to 215a-3. Conditional Approval No. 662 (October 28, 2004)
- *Merger of a National Bank into Nonbank Affiliate.* A national bank may cease its existence as a national bank by merging into a nonbank affiliate as authorized under 12 USC 215a-3 and the OCC's recently adopted regulation at 12 CFR 5.33(g)(5). The merger must be permissible for the nonbank affiliate under state law. The national bank may not be an insured bank at the time of the merger. Corporate Decision No. 2004-8 (March 15, 2004).
- *Merger of National Trust Bank into Nonbank Affiliates.* A national trust bank may terminate its activities and cease operations through a series of transactions as granted under the authority provided under 12 USC 215a-3 and the OCC's recently adopted regulation at 12 CFR 5.33(g)(5). Corporate Decision No. 2004-7 (March 31, 2004).
- *Operating Agreement.* The OCC conditionally approved a merger application involving two uninsured trust banks requiring that, prior to consummation, the resulting uninsured national bank enter into an operating agreement with the OCC. The operating agreement required the bank to: 1) provide the OCC with periodic strategic plans to include specific, measurable, and verifiable performance objectives, 2) maintain at least certain minimum levels of capital and liquid assets, and 3) enter into a capital assurance and liquidity maintenance agreement with its parent. Should the bank fail to meet the terms of the Operating Agreement, the bank would be required to submit a: 1) remedial action plan with modified objectives and a timeframe and implementation strategy, or 2) contingency plan to sell, merge, or liquidate the bank. Conditional Approval No. 624 (February 20, 2004)
- *Reverse Stock Split.* Pursuant to 12 CFR 5.46, a national bank in California may elect the corporate governance provisions of Delaware and complete a reverse stock split in accordance with those provisions. The approval is subject to conditions that the bank provide for dissenters' rights comparable to those found in 12 USC 214a, 215 and 215a, and pay the cost of

any appraisal (but not attorneys' or experts' fees) that might occur if a shareholder dissents. Conditional Approval No. 670 (December 27, 2004).

## *Lending*

- *Bridge Loans for Infrastructure Construction.* A national bank's subsidiary community development corporation may provide bridge loans to low- and moderate-income individuals and individuals living in low- and moderate-income areas to finance the installation of water and sewer infrastructure improvements. Approval of Bank's Self-Certification (December 27, 2004).
- *Most Favored Lender.* Under "most favored lender" provision of 12 USC 85 and Michigan parity statute, if state-chartered banks may charge prepayment fees to the same extent as federal savings associations, then national banks may, as well. Interpretive Letter No. 1004 (August 4, 2004).
- *Officer Residence.* The executive officer residence exception in Federal Reserve Regulation O, 12 CFR 215.5(c)(2), applies to a single loan secured by a first lien on one residence. Loans secured by an unconditional takeout commitment from the Federal Home Loan Mortgage Corporation ("Freddie Mac") do not qualify for the government agency takeout exception in 12 CFR 215.4(d)(3)(i)(B). Interpretive Letter No. 1009 (August 12, 2004).

## *Other Activities*

- *Diversity Jurisdiction.* The U.S. Court of Appeals for the Fifth Circuit, affirming the court below, held that, under 28 USC 1348, the statute governing the citizenship of national banks for the purpose of federal court diversity jurisdiction, a national bank is not "located" in every state in which it has a branch office. Instead, it is a citizen only of the states of its principal place of business and, if different, the state identified in its articles of association. *Horton* v. *Bank One, N.A.*, 387 F.3d 426 (5th Cir., October 5, 2004).
- *Diversity Jurisdiction.* Denying a petition for rehearing and rehearing en banc on January 28, 2005, the Fourth Circuit Court of Appeals let stand its November 1, 2004 opinion in which a divided panel of the court concluded that a national bank is a citizen of each state in which it has a branch office. In the decision, the panel majority construed the text of 28 USC 1348 (which states that national banks are "deemed citizens of the States in which they are respectively located") to unambiguously provide that national banks are citizens of each state where they have a significant permanent presence. The Fourth Circuit's decision is in conflict with decisions of the Fifth and Seventh Circuits construing the same language. *Wachovia Bank* v. *Schmidt*, 388 F.3d 414 (4th Cir. 2004). Citing the circuit split created by the decision in *Wachovia* v. *Schmidt*, the plaintiff in *Horton* v. *Bank One, N.A.*, filed a petition for certiorari with the Supreme Court seeking review of the Fifth Circuit's decision holding, in agreement with the Seventh Circuit, that a national bank is a citizen of at most two states, the state where its main office is located and the state where it has its principal place of business. Although Bank One prevailed in the Court of Appeals, it has asked the Supreme Court to grant the petition for certiorari to resolve the circuit split. *Horton* v. *Bank One, N.A.*, 387 F.3d 426 (5th Cir. 2004).
- *Golden Parachute Payments.* A U.S. District Court granted the OCC and FDIC summary judgment in a challenge to the agencies' denial of a national bank's request for permission to

make a severance payment and annual split dollar insurance premium payments to a terminated senior executive officer. The former executive officer challenged the interpretation of the golden parachute statute and regulations on which the agencies based their findings that the payments at issue were golden parachute payments and that reasonable grounds existed on which to base a denial. The court found that the agencies' interpretation and implementation of the law were reasonable. *Knyal* v. *OCC, FDIC,* No. C 02-2851 PJH (N.D. Cal., November 25, 2003).

## Insurance and Annuities Activities

- *Excess Lines Insurance.* Following the merger of a state-chartered bank into a national bank, the national bank may retain an operating subsidiary of the former state bank that provides "excess lines" insurance coverage for the parent bank. That is, the subsidiary provides liability insurance for the parent bank in excess of the limits for the bank's primary liability insurance that is obtained from a third party. This is an "authorized product" within the meaning of section 302 of the Gramm-Leach-Bliley Act of 1999. CRA Decision 125 (December 21, 2004).
- *Reinsuring Mortgage Insurance.* National banks may collectively own, with other financial institutions, a mortgage reinsurance company that provides mortgage reinsurance on the loans of the participating financial institutions and their affiliates and subsidiaries. The national bank participants may make a noncontrolling investment in the mortgage reinsurance company using the notice procedure available under the OCC's regulations at 12 CFR 5.36(e), if the bank otherwise qualifies under the criteria of that section. Interpretive Letter No. 985 (January 14, 2004).

## Securities Activities

- *Financial Warranties in Connection with a Mutual Fund.* A national bank and its wholly owned subsidiary may provide financial warranties under 12 CFR 1017 in connection with a specified mutual fund, under the specific facts described and subject to satisfying the safety and soundness considerations discussed. The circumstances involve a factually complex financial transaction. The financial warranties, in effect, guarantee that the investment structuring advice and asset allocation monitoring services provided by the bank in the creation and operation of the fund will result in the designed return to investors. Known in the industry as "principal protected" funds, the fund is designed so that investors will not lose any principal over a designated holding period and will earn a minimum fixed rate of return. Interpretive Letter No. 1010 (September 7, 2004)
- *Securities Transactions Reports.* For a national bank that has both manual and automated processes to track employee securities trades, Part 12 requirements that certain covered bank officers and employees report to the bank within 10 business days after the end of the calendar quarter all personal transactions in securities made by them in which they have a beneficial interest are waived. The bank receives all necessary data more promptly than the rule requires, either directly from its brokerage affiliate or through duplicate brokerage statements and confirmations of individual trades that the bank receives from other brokerages. Interpretive Letter No. 1011 (October 4, 2004).

### *Tying*

- *Homeowners Insurance Products.* A situation involving a particular solicitation letter offering homeowners insurance products to loan customers of a national bank subsidiary does not involve a prohibited tying arrangement under 12 USC 1972. Interpretive Letter No. 991 (March 11, 2004).

# Compliance

## Bank Secrecy Act/Anti-Money Laundering

- *Accounts from Foreign Entities.* An Interagency Advisory provides guidance to institutions concerning the acceptance of accounts from foreign governments, foreign embassies, and foreign political figures. OCC Bulletin 2004-26 (June 16, 2004).
- *Customer Identification Program FAQs.* An interagency set of "Frequently Asked Questions" (FAQs) clarifies various aspects of a regulation requiring banks, savings associations, credit unions, and certain non-federally regulated banks to have a customer identification program (CIP). The joint regulation implemented section 326 of the USA PATRIOT Act. OCC Bulletin 2004-3 (January 8, 2004).
- *Enforcement Guidance.* The OCC provides guidance on its policies for citing violations and taking enforcement actions with respect to the Bank Secrecy Act (BSA) compliance program rule (12 CFR 21.21) and the suspicious activity reporting (SAR) requirements (12 CFR 21.11). OCC Bulletin 2004-50 (November 10, 2004).
- *National Security Letter (NSL).* National banks are not expected to file suspicious activity reports simply upon receipt of a national security letter. Issues concerning national security letters will be addressed on an interagency basis. Interpretive Letter No. 1003 (July 21, 2004).
- *Safe Harbor for Reports of Suspicious Activities.* The OCC joined other regulatory authorities in issuing interagency guidance on a recent court ruling affirming the statutory safe harbor provision for financial institutions and their employees who report known or suspected criminal offenses or other suspicious activities pursuant to the 1992 Annunzio-Wylie Anti-Money-Laundering Act. "Suspicious Activity Reporting—Interagency Advisory: Federal Court Reaffirms Protections for Financial Institutions Filing Suspicious Activity Reports," OCC Bulletin No. 2004-24 (May 26, 2004).

## Consumer

- *Credit Card Marketing Practices.* Certain practices may entail unfair or deceptive acts or practices and may expose a bank to compliance and reputation risks. These include credit card solicitations that advertise credit limits "up to" a maximum dollar amount, when that credit limit is, in fact, seldom extended; the practice of using promotional rates in credit card solicitations without clearly disclosing the significant restrictions on the applicability of those rates; and increasing a cardholder's annual percentage rate or otherwise increasing a cardholder's cost of credit when the circumstances triggering the increase, or the creditor's right to effectuate the increase, have not been disclosed fully or prominently. OCC Advisory Letter 2004-10 (September 14, 2004).

- *Electronic Delivery of Consumer Disclosures.* The Electronic Signatures in Global and National Commerce Act (E-SIGN Act) permits disclosures to be made or delivered electronically, provided that the consumer consents to such disclosures in accordance with the requirements of the act. National banks contemplating making disclosures to their retail customers by electronic means should determine whether the special consumer consent provisions of the act apply to those disclosures. This advisory encourages national banks to pay particular attention to several issues when obtaining effective consumer consent to electronic disclosures. OCC Advisory Letter 2004-11 (October 1, 2004).
- *Enforcement of the Federal Trade Commission Act.* The Rhode Island Supreme Court, affirming the court below, held that the OCC had authority under the Federal Trade Commission Act to take enforcement action against national banks for unfair and deceptive practices, which prevents private plaintiffs from bringing an action against the bank under the Rhode Island Deceptive Trade Practices Act. *Chavers* v. *Fleet Bank (R.I.),* No. 02-201 (Rh.Isl. Sup. Ct., February 26, 2004).
- *Secured Credit Cards.* National banks should not offer secured credit card products (or similar unsecured products) in which security deposits (or fees) are charged to the credit card account if that practice will substantially reduce the amount of available credit and card utility for the consumer. The OCC enumerates recommended practices for issuers of secured credit cards in such areas as product marketing, product structure and terms, and credit risk management. OCC Advisory Letter 2004-4 (April 28, 2004).

# Enforcement Actions

## Bank Secrecy Act/Anti-Money Laundering

- *BSA/AML Enforcement Actions,* The OCC brought enforcement actions against banks for failing to maintain adequate BSA/AML compliance programs and ordered those banks to provide for internal controls, auditing, and employee training, and to designate a BSA compliance officer. Formal Agreement: Town-Country National Bank, Camden, AL, Enforcement Action No. 2004-4 (January 28, 2004); In the Matter of New York National Bank, Bronx, NY, Enforcement Action No. 2004-17 (February 18, 2004); In the Matter of First Liberty National Bank, Washington, DC, Enforcement Action No. 2004-32 (April 23, 2004); In the Matter of Merchants Bank of California, N.A., Carson, CA, Enforcement Action No. 2004-64 (May 27, 2004); In the Matter of Surety Bank, N.A., Fort Worth, TX, Enforcement Action No. 2004-65 (June 22, 2004); In the Matter of Fullerton National Bank, Fullerton, NE, Enforcement Action No. 2004-121 (September 21, 2004); Formal Agreement: First National Bank, Graford, TX, Enforcement Action No. 2004-115 (October 1, 2004); In the Matter of International Bank of Miami, N.A., Coral Gables, FL, Enforcement Action No. 2004-119 (October 18, 2004); In the Matter of First National Bank of Paonia, Paonia, CO, Enforcement Action No. 2004-131 (November 18, 2004).
- *BSA/AML Civil Money Penalty.* The OCC issued an order to cease and desist by consent requiring a bank to correct weaknesses in its audit and compliance procedures and assessed a $25 million civil money penalty for numerous BSA/AML violations, owing to the bank's failure to implement an effective anti-money laundering program. In the Matter of Riggs Bank,

N.A., McLean, Virginia, Enforcement Actions Nos. 2004-43 (May 13, 2004), 2004-44 (May 13, 2004).

- *Enforcement Action against Former CEO.* The chief executive officer of a national bank who was also the controlling shareholder of the bank's holding company had, among other things, allegedly failed to ensure that the bank complied with BSA/AML requirements. The officer/shareholder consented to the OCC's order of prohibition, assessment of a $10,000 civil money penalty, and personal cease-and-desist order to sell the bank or his shares in the bank's holding company within eight months. In the Matter of Jon R. Lindeman, Americana National Bank, Albert Lea, MN, Enforcement Action No. 2004-3 (February 1, 2004).

## Consumer Protection

- *Home Ownership Equity Protection Act and Other Violations.* The OCC brought a cease-and-desist and restitution actions against a Texas bank for violations of the Home Ownership Equity Protection Act (HOEPA), the Truth in Lending Act (TILA), the Real Estate Settlement Procedures Act (RESPA), and the Federal Trade Commission Act (FTC Act), for charging duplicative fees, unearned service fees, failing to provide required consumer disclosures, and other violations. The OCC ordered the bank to make restitution to affected customers in the amount of $288,000, and to take affirmative steps to improve its internal consumer compliance program. See In the Matter of Clear Lake National Bank, 11/07/2003, OCC-AA-EC-2003-25.
- *Secured Credit Cards.* A credit card bank offered secured credit cards to individuals with impaired credit histories and encouraged them to charge the required $200 security deposit to the card. After various fees were also charged to the card, customers who received the bank's minimum credit line of $260 had only $2.50 in credit available for their use. Nearly half of the individuals who enrolled in the program defaulted, damaging their credit ratings. The bank consented to an enforcement action that prohibited the bank from charging customer security deposits to credit cards and from charging interest on those security deposits, and prohibited the bank from accepting deposits to fund its operations. The bank was also required to set aside $10 million to pay restitution to affected customers. In the Matter of First National Bank of Marin, Las Vegas, NV, Enforcement Action No. 2004-45 (May 24, 2004).

## Other

- *Independent Service Organizations.* A national bank failed as a result of excessive charge-backs in its merchant processing portfolio, owing to fraud by several merchants. The bank had contracted with several independent service organizations (ISO) to conduct the underwriting function for merchants, including ISO CashGate Inc., which was responsible for underwriting virtually all of the merchants engaged in fraudulent activity. The OCC initiated enforcement actions against the two officers of CashGate Inc. The former president of CashGate Inc. consented to the OCC's order of prohibition, cease-and-desist order prohibiting him from providing goods or services to any insured depository institutions, and a $2,500 civil money penalty assessment. The second officer also recently consented to the OCC's cease-and-desist order and assessment of a $2,500 civil money penalty. In the Matter of Bernard P. Kennedy State Bank of Metropolis, Metropolis, IL, Enforcement Action No. 2004-19 (April 2, 2004): In the Matter of Gregory Healey (October 19, 2004).

- *Lending Division, Closure.* A bank had permitted one of its departments to engage in unsafe and unsound banking practices. In addition, the OCC found significant deficiencies in the board of directors' oversight and management of the day-to-day operations of that department, exposing the bank to substantial reputation, transaction, and litigation risk. The OCC issued a cease-and-desist order by consent that formalized the shut-down of that department. The order also required vigorous actions to address deficiencies in the bank's compliance with BSA and USA PATRIOT Act; required increased capital levels, in view of increased risks; and required the correction of problems with the bank's books and records. In the Matter of International Bank of Miami, N.A., Coral Gables, FL, Enforcement Action No. 2004-119 (October 18, 2004).
- *Uninsured Trust Bank Formal Agreements.* The OCC brought an enforcement action against an uninsured trust bank that engaged in "rent-a-charter" activities (a practice in which a nonbank company will contract with a national bank, thereby enabling the nonbank company to conduct an aspect of its business through the national charter and prompting the company then to claim that its activities enjoy the benefits of a national bank charter) but failed to maintain proper internal controls and entered into agreements with participating companies that conceded rights to those companies without retaining similar rights for the trust bank, among other unsafe and unsound practices. The OCC and the trust bank entered into a formal agreement requiring the trust bank to restrict and review the bank's agreements with third parties, conduct an internal audit, develop a written risk management program, and adopt a written fiduciary compliance program. Formal Agreement, National Independent Trust Company, Ruston, LA, Enforcement Action No. 2004-36 (May 3, 2004).

# International

- *Information-sharing Agreements with Foreign Bank Supervisors.* In 2004, the OCC entered into memoranda of understanding (MOUs) pertaining to information sharing with banking supervisors in China, Poland, and France. We also updated our existing MOU with Panama to include the FDIC. "Memorandum of Understanding between the China Banking Regulatory Commission, the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation" (June 17, 2004). "Memorandum of Understanding between the Office of the Comptroller of the Currency, and the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation, and the Commission for Banking Supervision of the Republic of Poland" (October 23, 2004). "Memorandum of Understanding (Joint Statement) Between the *Commission bancaire,* and the Board of Governors of the Federal Reserve System, and the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation" (May 19, 2004). "Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, and the *Superintendencia de Bancos* of the Republic of Panama Statement of Cooperation" (October 5, 2004)

# Investments*

- *Bank-owned Life Insurance.* A national bank's investment in separate-account bank-owned life insurance will be considered a qualified investment under the Community Reinvestment Act (CRA) if the separate account in which the bank invests is comprised of investments intended to be qualified under the CRA. Interpretive Letter No. 1008 (July 19, 2004).
- *Certificates of a U.S. Agency Created Under the Foreign Assistance Act.* Certificates issued by a U.S. agency created under the Foreign Assistance Act may qualify as Type I securities under 12 CFR Part I and accordingly are available for investment by national banks without limitation, subject to safety and soundness considerations. Interpretive Letter 1001 (May 3, 2004).
- *Clearing House.* In a reorganization of the clearing house into a holding company with subsidiaries, national banks may lawfully acquire and hold minority interests in both the new holding company and its subsidiaries. Interpretive Letter No. 993 (May 16, 2004).
- *Equity or Below-investment-grade Debt in Exchange for Corporate Debt.* A national bank may accept, as part of a court-administered bankruptcy proceeding, equity or below investment-grade debt in exchange for corporate debt originally acquired and held as a Type III investment security, under the authority of national banks to accept such securities in satisfaction of debts previously contracted. Interpretive Letter 1007 (September 7, 2004).
- *Foreign Operating Subsidiary.* A national bank and a foreign bank may jointly own a foreign entity that will hold, purchase, and sell loans and other extensions of credit. Although the national bank owns only 10 percent of the voting rights, the entity qualifies as an operating subsidiary of the national bank because the national bank may exercise control over it. Conditional Approval No. 646 (June 28, 2004).
- *Limited Partnership as an Operating Subsidiary.* A national bank may establish a limited partnership (LP) as an operating subsidiary, with a wholly owned limited liability company (LLC) as the limited partner and a wholly owned corporation as the general partner, to conduct a bank permissible activity. The LLC and corporation are each directly and wholly owned by the bank, resulting in the bank exercising, indirectly through the LLC and corporation, all economic and management control over the activities of the LP. The LP will hold participation interests in loans originated and purchased by the bank. Corporate Decision No. 2004-16 (September 10, 2004).
- *LLC—Employee Benefit Plans.* A national bank may acquire and hold noncontrolling equity interests in a limited liability company (LLC) that administers employee benefit plans for: (1) its investors, which are primarily financial institutions; and (2) other companies that have no equity interest in the LLC. Interpretive Letter No. 994 (June 14, 2004). *Second-Trust Deed Permanent Loan.* A national bank may invest, as a limited partner, in a community development entity formed under the federal new markets tax credit program which acquires real estate loan made to qualified, active, low-income community businesses. The specific investment fund invests in second-trust deed permanent loans on retail, office, commercial, and industrial projects. Approval of Bank's Self-Certification (November 22, 2004).

* For investments in partnerships, note that subsidiaries of national banks may become general partners, but national banks may not.

- *Second-Trust Deed Permanent Loan.* A national bank may invest, as a limited partner, in a community development entity formed under the federal new markets tax credit program which acquires real estate loan made to qualified, active, low-income community businesses. The specific investment fund invests in second-trust deed permanent loans on retail, office, commercial, and industrial projects. Approval of Bank's Self-Certification (November 22, 2004).
- *Stock Warrants.* A national bank that permissibly acquired stock warrants of borrower (12 CFR 7.1006) may, under the specific circumstances and conditions represented by the bank, exercise the warrants in order to immediately sell the resulting stock. Interpretive Letter No. 992 (May 10, 2004).
- *Structured Finance Transaction.* A national bank may acquire an interest in an operating subsidiary in which a financial services company chartered and operating in the United Kingdom also will have an interest. The operating subsidiary was created for the purpose of facilitating a complex structured finance transaction by which the national bank will lend money to the financial services company. Corporate Decision Letter No. 646 (June 28, 2004)
- *Tax Credits.* A national bank may make a noncontrolling investment in a limited liability corporation (LLC) in order to generate new markets tax credits. The LLC may engage in activities not permissible for national banks as long as the bank's investment in a series of membership units is segregated from all other investments and used only for bank permissible purposes. Interpretive Letter No. 996 (July 6, 2004).
- *Transitional Housing.* A national bank may invest, through its subsidiary community development corporation, in the acquisition and rehabilitation of a single-family dwelling to provide transitional housing for the homeless. The CDC will own and manage the property and residents of the facility will receive case management support from an established nonprofit social services provider. After successful completion of the transitional housing program, for a term of one to two years, qualified residents would be provided an option to purchase the dwelling. Approval of Bank's Self-Certification (April 26, 2004).

# Preemption

- *Clarifications of OCC's Determination and Order Preempting the Georgia Fair Lending Act (GFLA).* Two OCC letters clarify aspects of the OCC determination and order concluding that the GFLA was preempted with respect to national banks and their operating subsidiaries. The determination and order was published in the *Federal Register* at 68 Fed. Reg. 46264 (August 5, 2003). One letter describes the provisions of the GFLA Act that are not preempted by the determination and order; explains that questions about the applicability of any state insurance sales laws to national banks are outside the scope of the determination and order and the OCC's new preemption rule; and discusses the applicability of the determination and order and the preemption rule to mortgage brokers. Interpretive Letter No. 1000 (April 2, 2004). A second letter further clarifies the applicability to mortgage brokers of the determination and order the OCC's final preemption rule. Interpretive Letter No. 1002 (May 13, 2004).
- *Consumer Protection.* The OCC addresses concerns about the impact of the OCC's preemption and visitorial powers rules on consumers, explaining the agency's approach to preventing predatory lending practices, and describing its record of taking appropriate action to protect

consumers if the agency finds such practices have occurred. Interpretive Letter No. 999 (March 9, 2004).

- *Document Preparation Fees.* A state court in Michigan held that a national bank had a right to charge document preparation fees in connection with its mortgage lending activities without being subject to the restrictions on such fees imposed by Michigan law. *Brannam* v. *The Huntington Mortgage Co.*, Case No. 00-40439-CH (Cir. Ct., Muskegon City, MI, February 2, 2004).
- *Document Preparation Fees.* Court in Illinois upheld the dismissal of 37 cases, consolidated for appeal, in which the plaintiffs sought to recover restitution or damages for document preparation fees that they had paid in connection with obtaining real estate mortgages. The OCC had filed an amicus brief with the court below in support of a national bank's position that federal law authorizes the bank to charge document preparation fees. Although the appellate court dismissed the cases on a different ground, this did not vacate the decision of the trial court. *Jenkins* v. *Concorde Acceptance,* Consol. Appeal No. 02-2738 (App. Ct., Ill., December 31, 2003).
- *Information Sharing with Affiliates.* The Fair Credit Reporting Act (FCRA) preempts state laws that impose restrictions on information sharing with affiliates. The defendant municipalities withdrew their appeal to the Ninth Circuit of a U.S. District Court decision holding that provisions of the FCRA preempt ordinances that impose restrictions on the sharing of confidential consumer information between financial institutions and their affiliates. They repealed the ordinances that were the subject of the litigation and moved the court to dismiss the appeal as moot and to vacate the district court's order. The Ninth Circuit granted the motion, and the district court vacated its decision. *Bank of America* v. *Daly City,* Nos. C 02-4343 and C 02-4943 (N.D. Cal. 2003).
- *Multistate Fiduciary Operations.* A national bank has the authority to implement a national fiduciary program. Pursuant to the OCC's regulations at 12 CFR 9.7(e)(2), any state law, other than a law made applicable by 12 USC 92a, that limits or establishes preconditions on the exercise of the fiduciary powers that are to be exercised as part of the bank's program are not applicable to the bank. Finally, while a national bank may have the federal authority to act in various fiduciary capacities in a given state, that authority does not determine whether a state instrumentality has authority under its governing state statutes to contract with the national bank for fiduciary services. Interpretive Letter No. 995 (June 22, 2004).
- *Prepayment Fees.* National banks can charge prepayment fees to the same extent as federal savings associations under 12 USC 85 and the Michigan parity statute that allows state banks to charge prepayment fees to the same extent as federal savings associations. Interpretive Letter No. 1004 (August 4, 2004).
- *State Anti-discrimination Laws.* State anti-discrimination laws are generally not preempted by the OCC's new preemption rule. Interpretive Letter No. 998 (March 9, 2004).
- *State Law Restricting Balloon Payment Loans.* A state law that places restrictions on the terms of loans with balloon payment features is preempted with respect to a national bank and its operating subsidiaries. Interpretive Letter No. 1015 (September 20, 2004).

- *State Law Regulation of Mortgage Operating Subsidiary.* The U.S. District Court for Connecticut, in granting the bank's motion for summary judgment, held that 12 CFR 7.4006 preempts state laws that purport to impose on national bank operating subsidiaries a state regulatory regime requiring businesses engaged in the making of first and second mortgages to obtain a state license and subjecting them to enforcement proceedings by the Connecticut Banking Commissioner. *Wachovia Bank, N.A.* v. *Burke*, 319 F.Supp.2d 275 (D. Conn., May 25, 2004). In a separate case, the U.S. District Court for the Western District of Michigan, in granting the bank's motion for summary judgment, held that 12 CFR 7.4006 preempts state law that purports to authorize the Michigan Banking Commissioner to require national bank operating subsidiaries to obtain a state license in order to engage in the business of making of first and second mortgages on behalf of its parent bank. *Wachovia Bank, N.A.* v. *Watters*, 334 F.Supp.2d 957 (W.D. Mich., August 30, 2004).
- *State Unclaimed Property and Escheat Laws.* An OCC letter to the National Association of State Treasurers (NAST) and the National Association of Unclaimed Property Administrators (NAUPA) clarifies that the OCC's preemption and visitorial powers regulations do not change existing standards, established by U.S. Supreme Court precedent and federal statute, that govern the applicability and enforcement of state unclaimed property and escheat laws. Interpretive Letter No. 1006 (August 19, 2004).
- *Uniform Commercial Code.* An OCC letter to the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI) clarifies the scope of the final preemption rule. It confirms the conclusions of NCCUSL and ALI that the Uniform Commercial Code (UCC) does not "obstruct, impair, or condition" the ability of national banks to exercise fully the powers granted by federal law; and those powers are implemented and supported by the UCC, which provides a uniform law of general applicability on which parties rely in their daily commercial transactions. Interpretive Letter No. 1005 (June 10, 2004).

# Regulations

- *Annual Report on Operating Subsidiaries (12 CFR Part 5).* This final rule requires a national bank to file an annual report on operating subsidiaries that identifies the national bank's operating subsidiaries that do business directly with consumers and that are not functionally regulated. The annual report includes certain information about each operating subsidiary, such as the name of the operating subsidiary, its location and contact information, and the operating subsidiary's lines of business. The OCC makes this information available to the public on its Web site at http://www.occ.gov in order to assist consumers in identifying entities that are national bank operating subsidiaries. 69 Fed. Reg. 64478 (November 5, 2004).
- *Fundamental Change in Asset Composition of a Bank (12 CFR 5).* This final rule requires a national bank to obtain the OCC's prior written approval before making two types of fundamental changes in the composition of the bank's assets: (1) changing the composition of all, or substantially all, of its assets through sales or other dispositions; or (2) after having sold or disposed of all, or substantially all, of its assets, subsequently purchasing or otherwise acquiring assets or otherwise expanding its operations. The requirements of the final rule do not apply if a bank changes its asset composition as part of a voluntary liquidation and the liquidating bank has stipulated in its notice of liquidation to the OCC that its liquidation will be completed, the bank dissolved, and its charter returned to the OCC. The final rule also does not

apply if a national bank changes the composition of all, or substantially all, of its assets in response to direction from the OCC (e.g., in an enforcement action pursuant to 12 USC 1818) or if a change in asset composition occurred as a result of a bank's ordinary and ongoing business of originating and securitizing loans. 69 Fed. Reg. 50293 (August 16, 2004).

- *Lending Limits Pilot Program (12 CFR Part 32).* This final rule extends and expands the lending limits pilot program that currently authorizes special lending limits for 1- to 4-family residential real estate loans and small business loans. Under the pilot program, which originated in 2001 and was scheduled to expire in June 2004, eligible national banks with main offices located in states that prescribe a lending limit for residential real estate loans or small business loans that is higher than the current federal limit may apply to take part in the program and use the higher limits. The final rule extends the pilot program for three years, until June 2007, and expands the program to include certain agricultural loans. 69 Fed. Reg. 51355 (August 19, 2004).
- *Preemption Rule (12 CFR Parts 7 and 34).* The OCC issued a final rule amending Parts 7 and 34 of its regulations to add provisions clarifying the applicability of state law to national banks. The rule identifies particular types of state laws that are preempted, as well as the types of state laws that generally are not preempted, with respect to national banks' lending and deposit-taking activities. Consistent with the standards of federal preemption that have been articulated by the U.S. Supreme Court, the rule provides that state laws are preempted if they "obstruct, impair, or condition" a national bank's exercise of its federally authorized powers. The rule also contains an anti-predatory-lending standard that bars a national bank from making a consumer loan based predominantly on the foreclosure or liquidation value of the borrower's collateral without regard to the borrower's ability to repay the loan according to its terms. Finally, the rule provides that a national bank shall not engage in practices that are unfair or deceptive within the meaning of section 5 of the Federal Trade Commission Act. 69 Fed. Reg. 1904 (January 13, 2004).
- *Proper Disposal of Consumer Information Under the Fair and Accurate Credit Transactions Act of 2003 (FACT Act) (12 CFR Parts 30 and 41).* This joint final rule, issued by the OCC, the Federal Reserve Board, the FDIC, and the OTS, implements section 216 of the FACT Act, which amended the Fair Credit Reporting Act. The final rule amends Interagency Guidelines Establishing Standards for Information Security. It generally requires each financial institution to develop, implement, and maintain, as part of its existing information security program, appropriate measures to properly dispose of consumer information derived from consumer reports to address the risks associated with identity theft. 69 Fed. Reg. 77610 (December 28, 2004).
- *Risk-based Capital Guidelines: Asset-backed Commercial Paper Programs (12 CFR 3).* The joint final rule issued by the OCC, FRB, FDIC, and OTS, amends the risk-based capital guidelines of the OCC, the Federal Reserve Board, the FDIC, and the OTS to permit sponsoring banks, bank holding companies, and thrifts to exclude from their risk-weighted asset base those assets in asset-backed commercial paper (ABCP) programs that are consolidated onto sponsoring bank's balance sheets as a result of Financial Accounting Standards Board Interpretation No. 46, Consolidation of Variable Interest Entities, as revised (FIN 46-R). The joint final rule also generally requires banks to hold risk-based capital against eligible ABCP liquidity facilities with an original maturity of one year or less that provide liquidity support to

ABCP by imposing a 10 percent credit conversion factor on such facilities. 69 Fed. Reg. 44908 (July 28, 2004).

- *Rules, Policies, and Procedures for Corporate Activities; International Banking Activities (12 CFR 5 and 28).* This final rule clarifies certain regulatory definitions and simplifies approval procedures for foreign banks seeking to establish federal branches and agencies in the United States. These changes conformed the treatment of federal branches and agencies of foreign banks to that of their domestic national bank counterparts. 68 Fed. Reg. 70691 (December 19, 2003).
- *Visitorial Powers Rule (12 CFR Part 7).* The OCC issued a final rule revising its visitorial powers regulation in two respects. The first change clarified that the OCC's exclusive visitorial authority applies only with respect to the content and conduct of activities that are authorized for national banks under federal law and regulations. The second change clarified that the exception to OCC's exclusive visitorial powers for "visitorial powers. . . . Vested in the courts of justice" does not grant to the states any new authority to inspect, supervise, direct, regulate, or compel compliance by a national bank with any law regarding the content or conduct of activities authorized for national banks under federal law. 69 Fed. Reg. 1895 (January 13, 2004).